50th Annual Philip E. Heckerling Institute on Estate Planning
January 22-26, 2018
Heckerling 2018 - Report No. 6
(Wednesday 1/24/18)

Heckerling 2018
University of Miami School of Law Center for Continuing Legal Education
Orlando World Center Marriott Resort and Convention Center
Orlando, Florida
http://www.law.miami.edu/heckerling

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As we have done in January for the last twenty one years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 52nd Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 22-26, 2018 at the Orlando World Center Marriott Resort and Convention Center in Florida. A complete listing of the proceedings and the Institute's 2018 brochure are available at www.law.miami.edu/heckering. **Introduction Part 1** issued on 1/11/18 covered the Institute Opening Reception, its Scope, the Faculty, the Advisory Committee, the Sponsors and the Vendors, plus general information at the end about the Institute. **Introduction Part 2** issued on 1/12/18 contained a complete listing of all of the proceedings of this Institute. This Report continues our coverage of the proceedings.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Heckerling Reports Website, as we have since the 2000 Institute. The Reports from 2000 to 2017 can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling.htm. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

**Announcement:** Leimberg Information Services, Inc. (LISI) has recently announced the addition of a new **Analyzer** to it's suite of web-based products. According to them, It is designed to answer the following three questions that have arisen as a consequence of the enactment of new Code Section 199A as part of the Tax Cuts and Jobs Act of 2017: (1) What will a client's pass-through deduction look like; (2) Is a particular client better off being a C Corporation or a pass-through entity; and (3) Is a client better off staying as an employee or switching to independent contractor status. More information is available at www.leimbergservices.com/analyzers. While you are at it, consider subscribing to the LISI Newsletter Service if you have not already, which costs $30 per month and currently offers newsletters covering up to nine different topics of your choice. See www.leimbergservices.com.

**Summary:** This Report #6 begins our coverage of the Special Sessions that were held on Wednesday afternoon. The ones included here are 1-A on basis, 1-B on buy-sell agreements, 1-C on US - Non-US tax issues, and 1-D on fiduciary cases.

The next Report #7 will continue our coverage of the Wednesday afternoon Special Sessions.
Wednesday, January 24, 2018 (cont.)

2:00-3:30 SPECIAL SESSIONS I

Session I-A
Building Basis, Beyond the Basics: Effective and Efficient Basis Building Strategies for Your Client

Presenters: Paul S. Lee + Turney P. Berry + Ellen K. Harrison
Reporter: Patrick Duffey

Building on Paul Lee's Tuesday General Session (Report #3), the panel explored today’s timely techniques to maximize and concentrate basis, including practical steps required to implement these strategies. The discussion included upstream planning, powers of appointment to create basis, using leverage, using partnerships to move basis to where you want it, and planning that benefits charity while capturing new basis for the family.


Turner Berry discussed the use of general powers of appointment in basis planning or what he called “upstream planning.” Berry discussed the range of powers of appointment, generally, and those that would generally be used to manipulate basis. In crafting powers of appointment, it is important to keep in mind that the goal of these powers of appointment is to trigger tax consequences without the powerholder actually exercising the power. Therefore, the power used in Berry’s examples was a testamentary power of appointment limited to the creditors of the holder’s estate. What is a “creditor” is outside the scope of the presentation, but the panel noted that there can be some gray area and it is worth exploring if you intend to use this technique. The example power is also exercisable only with the consent of a non-adverse person. The goal is to extend the power over appreciated (not depreciated) assets to avoid getting a step-down in basis. Broadly, this is about income tax planning so it is important to avoid estate tax—in order to do so, the extent of the power is capped at roughly $1,000 less than the remaining applicable exclusion amount of the power holder taking into account their other assets.

Berry outlined an example using his grandmother’s trust as the owner of appreciated assets and his mother as the holder of the general power of appointment. By giving his mother a testamentary general power of appointment to the extent of her remaining exclusion about, Berry achieved a significant step-up in basis on trust assets without giving his mother a taxable estate.

Creditor issues are worth considering. At common law, the general rule was that creditors could not access assets subject to a testamentary general power of appointment unless the power was actually exercised. Berry expressed practical concern about “sympathetic” creditors causing a court to find a way to get around what is a correct but technical argument.
Conceptually, upstream planning is about recognizing that a family member with a net worth under the applicable exclusion amount (now roughly $11 million) have an “asset” that can be used to help with step-up in basis for those with taxable estates or even for those with longer life expectancies. Berry discussed using non-relatives who might not have notice of the power of appointment, but concluded using upstream planning with strangers was ill advised.

Berry then discussed a product that he developed called an UPSPAT: an upstream power of appointment trust. Essentially, the UPSPAT is an intentionally defective grantor trust with a testamentary general power of appointment as outlined above. The trust begins unfunded but the grantor then transfers in assets in exchange for a promissory note that is guaranteed by a more senior family member who has a testamentary general power of appointment over the assets in the trusts. Berry believes that the trust assets would get a step up in basis. The question, said Berry, was the extent to which those assets should be included in the gross estate of the more senior family member. While one might take the position that there is no inclusion, Berry takes the more conservative position that the assets are fully included.

**Part II – Basis Planning with Non-U.S. Grantors, Trusts, and Holding Companies.**

Ellen Harrison lead the discussion on the international aspects of basis planning. Broadly, international basis planning takes advantage of the general principal that U.S. Estate tax does not apply to non-resident aliens—it applies only to their U.S. situs assets. Harrison noted that it is important to keep in mind that the definition of U.S. situs is not the same for U.S. Gift Tax purposes as it is for Estate Tax purposes. Furthermore, planners must always consult the applicable treaty to ensure that it does not overrule the code rules.

Harrison discussed a private letter ruling obtained by her in 2012, PLR 201245006. There, the Grantor was Canadian with a trust that held stock in a Canadian company. The grantor sought grantor trust status by virtue of being the sole beneficiary of the trust during his life. Harrison noted that in drafting the ruling, it appeared that the Service cited the wrong subsection in 1014, which ended up causing quite a bit of confusion in the industry. Subsequently, the Service issued a no-rulings policy on similar issues.

Harrison then moved on to a discussion on basis step up for assets held by foreign holding companies. A liquidation of a foreign corporation at the date of death of a non-resident alien who leaves assets to U.S. persons can be used to step-up the basis of those assets. Before the recent tax reform, if a foreign holding company was liquidated within thirty days of decedent’s death, the basis of the assets owned by the company would be stepped-up to fair market value. This result is changed by new tax law.

If eligible, Harrison recommends that foreign companies make a “check-the-box” election. If a check-the-box election is made, the company either becomes a disregard entity (in the event of a single shareholder) or a partnership (in the event of multiple owners). When you file the election for an 8832, you can choose the effective date of the election that is retroactive for up to seventy five days before you file the form. Where the classification of a foreign holding company was relevant for U.S. tax purposes prior to the check-the-box election, the election is a deemed liquidation. The check-the-box election has the advantage of being a U.S. tax event only that has no consequences under foreign law.
Part III – Basis Shifting Techniques with Disregarded Entities.

Paul Lee discussed basis shifting with two types of disregarded entities: partnerships and grantor trusts. In each case, he outlined specific structures of the contemplated transactions that comprise those techniques using hypothetical examples.

When using partnerships to shift basis, Lee looks for three distinct things: the entity must be taxed like a partnership, there must be some low basis assets, and there should be a group of partners that have a low outside basis (perhaps as low as zero). The partnership should be “old and cold” with assets contributed at least seven years prior or the assets could have been purchased by the partnership more recently.

In Lee’s example, one group of partners owned ten percent of the partnership (minority partners) and one group of partners owned the remaining ninety percent of the partnership (majority partners); each had an outside basis of zero. The first step of the technique was a loan to the partnership that was guaranteed by the outside assets of the minority partners. The loan proceeds are then used to purchase a diversified portfolio of assets within the partnership. After that, the minority partners then have a significant upward adjustment to their outside basis due to their guarantee of the loan. Next, the high-basis diversified portfolio is distributed to the majority partners (who still has an outside basis of zero); that distribution results in basis being stripped from that high basis property because of the outside basis of the majority partners. Finally, a 754 election is used to move basis over to the only other partnership asset, the low basis asset (perhaps stock in a start-up) that the partnership began with. Conceptually, the majority owner has exchanged their interest in that low-basis stock (perhaps in a start-up) for a low-basis diversified portfolio.

Lee pointed out that the 2017 tax reform act eliminated 1031 like-kind exchanges for all property other than real property—thus, it is no longer permissible to have like kind exchanges for things like artwork or collectables. But, Lee posited, because the above-described transaction functions much like an exchange, it might be used to facilitate such exchanges where (i) the property could be borrowed against and (ii) there was enough built-in gain to justify such a structure.

Harrison then pointed out that Berry’s technique—that is, using general powers of appointment for “upstream” basis planning—could be combined with the technique outlined by Lee to get a basis step-up in the resulting low-basis diversified portfolio.

Lee then described a transaction to accomplish basis shifting with a grantor trust. In that example, the partnership was owned by an S-Corp. (<1%) and an intentionally defective grantor trust (essentially 100%) and held a low-basis asset. Another, higher basis, asset is contributed to the partnership by the trust and the grantor (50/50). This implicates the unitary basis rule and Lee outlined the application of that rule to the transaction. The next step is to turn off the grantor trust status of the trust which should be a deemed transfer of assets owned by the trust. As a result, half of the interest in the high-basis asset is deemed to be transferred to what is now the non-grantor trust. Now, a distribution of the high-basis asset to the non-grantor trust results in half of the basis in that asset being stripped and shifted to the low basis asset. Assuming the asset was contributed at least two years prior, the transaction wouldn’t trigger gain.
In closing, Berry discussed PLR 201633021, which he described as a once-in-a-generation PLR. Generally, the ruling provided that if one trust has the ability to withdraw all income from a second trust, the first trust will be treated as owning the second trust. Berry shared an example of the application of the PLR, which involved a formerly terminated trust that owned some later-discovered tangible personal property and therefore needed to be “revived” in order to determine ownership of that property.

Session I-B
Special Issues in Drafting (and Administering) Buy-Sell Agreements [CHB]
Presenters: Louis A. Mezzullo + Nancy G. Henderson
Reporter: Kristin Dittus
The panelists shared best practices in drafting buy-sell agreements in contemplation of divorce, creditors, ownership by charitable and non-charitable trusts and other entities, transfer tax audits, and disputes among business owners. This presentation builds on Mr. Mezzullo's General Session that was presented on Tuesday (Report #3)

The panel used a hypothetical for their presentation. The hypothetical involved a family, husband and wife who owned a limited partnership each with a 1% GP interest and 25% LP interest held by their revocable trusts. Their two daughters each are 10% LPs, wife’s son owning a 4% LP interest, an irrevocable exempt trust for the two daughters owning 10% each, and a 4% interest in irrevocable exempt trust for wife’s son. There is an estranged son of husband’s who is married. Husband’s estate plan provides for discretionary bypass trust for wife and his descendants with exempt and non-exempt QTIPs. Husband specifically disinherits his and wife’s son. Wife’s trust creates bypass trust for husband and her descendants and exempt and non-exempt QTIPs. Upon death of survivor, husband’s trust creates GST exempt trust for daughters and descendants and distributes outright the non-GST exempt portion. Wife’s trust upon survivor provides for GST exempt trust divided into shares for daughters and son and non-exempt portion passes outright to the three. Wife’s trust specifically disinherits husband’s son.

Using this hypothetical the panelists discussed a number of issues to consider regarding buy-sell agreement drafting. Important that the agreement integrate the business terms with client’s estate planning documents.

In the family context client’s goals are to maintain control by family members, protect family member from impulsively disposing of their interest, and if possible save or defer transfer and other taxes. From the business perspective it is to protect it from estranged family members, former spouses or hostile family members, creditors, interference from non-family members and disruptive family members, and avoid disputes among family members.
Some non-tax considerations include trusts and entities as family owners, addressing ex-spouses, creditors and involuntary transferees, buying out disruptive or unpleasant owners, and rights arising from non-cash or gratuitous transfers.

In drafting for trust owners, who is considered the business owner for purposes of the agreement, settlor, beneficiary, and trustee? In the trust context what is a transfer. Who is the target person for triggering the agreement, i.e. death, incapacity, divorce? Is it settlor, beneficiary, trustee, spouse.

Regarding permitted transferee, who so qualifies as a permitted transferee. Generally allow transfers to family members. Who is a family member? Does a family member include a family trust? Does the term include descendant, spouse and how is spouse defined. Does term descendant include a person that estate planning documents may disinherit or a family member that client would not desire to end up with an ownership interest. A family trust may depend upon whether the trust is revocable or irrevocable. In a revocable trust a family member generally relates to grantor, trustee being the family member. In an irrevocable trust how is the family defined.

With trusts what constitutes a transfer. In a revocable trust generally the death of grantor unless the interest passes to a defined permitted transferee. In an irrevocable trust possibly the death of grantor or a certain beneficiary or some other identified event. Trusts in general must consider what constitutes a transfer, i.e. change of trustee unless a family member or a person approved by family is the trustee.

In agreements also need to consider when entities other than trusts are owners, such as LLCs, that may have its own built-in buy-sell provision. If there is an entity owner, how does that qualify as a family member? What changes at the entity level trigger a transfer? For example, change in ownership or change in management or control of the entity.

How does the agreement address a divorce or death of a non-family member spouse irrespective of how spouse acquired interest, during marriage, voluntary permitted transfer, or death? If divorce is a trigger event valuation and terms must be reasonable and if not, family court will factor that value against the family member in property division between the spouses.

Address how to purchase a problem owner or family member. Generally this will be someone with a minor interest; if it is a party with a significant interest generally liquidation will be the exit mechanism. A vote or decision of a significant ownership group, i.e. super majority may trigger such a purchase.

If the triggering event is an owner with creditor issues, valuation and terms must be reasonable. Consider the impact, if any, of the Uniform Voidable Transactions Act. Comment 8 to Intent in the Act states in part, that a simple exchange by a debtor for a less liquid asset may be voidable. Example, could the exchange of an ownership interest in a business for a promissory note with deferred payment terms be a voidable transaction.
Typical transfer trigger is a right of 1st refusal when party receives an offer from an outside 3rd party. How does the agreement, if any, address a proposed transfer that involves non-cash consideration. Same consideration when the transfer is gratuitous.

If a marital trust is the seller must be concerned that the value is fair market value. If value pursuant to the agreement is understated, it impacts the marital deduction as that will be limited to the agreement value whereas estate tax value may be significantly greater; could disqualify the QTIP trust entirely; and open a possible Section 2519 issue. The Section 2519 issue may be addressed by granting spouse a limited power of appointment in the QTIP.

If the business may qualify for Section 6166 relief, run the numbers to make certain if death is one of the trigger events that the estate is left with sufficient ownership and value so as to qualify for Section 6166. If the estate initially qualifies, and then sale occurs, the Section 6166 estate tax deferral may be accelerated.

In the agreement address dispute resolution, such as mediation, arbitration (whether mandatory), and if arbitration, will discovery be permitted, is decision appealable, and how are costs allocated.

The agreement must identify how valuation is determined, agreed price, book value, appraisal or other fixed or objectively determinable value. Provide instructions to valuation person, i.e. are discounts to be considered.

The panelists did not favor charities as potential owners especially not for a long term.

The session concluded with discussion of the Amlie case, TC Memo 2006-76 where family agreed upon price for shares in bank stock was upheld even though after death the purchaser, son, sold the same shares at almost twice the price paid for the shares. This is a Section 2703 case. Compare this with Blount, 428 F.3d 1338 where case failed both pre Section 2703 law and Section 2703, where the purchaser was a non-family member an ESOP.

Session I-C
Two Systems Separated by a Common Language: U.S. Tax Law Meets Non-U.S. Trust Law [INT][TRU]
Presenters: M. Read Moore + Alec R. Anderson
Reporter: Michael Sneeringer

This session considered the application of U.S. income tax laws to trusts administered outside the United States in the context of non-U.S. trust law and typical administrative practices of non-U.S. trustees, including issues related to the establishment and settlement of non-U.S. trusts, trust administration outside the United States, distributions from
foreign trusts, and termination of foreign trusts. It builds on the Wednesday morning General Session presentation by Mr. Moore (Report #4)

I. Introduction

A. M. Read Moore (“Read”) introduced the topic and noted that it is a spinoff from his earlier talk. He indicated that Alec R. Anderson (“Alec”) and he would discuss four factual scenarios, and the issues that arise. He noted that half of his outline is obsolete, specifically anything on controlled foreign corporations.

II. Example 1

A. Read described the first example: daughter from Sweden is now a U.S. citizen with a U.S. spouse, living in the U.S. with her U.S. kids. Her Swedish parents are now in the U.K. She will get an inheritance; should a trust be used?

B. Read turned over the jurisdictional discussion to Alec. He stated that the preference for Alec’s response should be a jurisdiction other than the U.S. or U.K. (or Bermuda, because Alec practices in Bermuda and the panel wanted objectivity).

C. Alec noted that Jersey, Guernsey and the Cayman Islands are his best picks (besides Bermuda) for trust situs jurisdictions. He noted the importance of dealing with advisors in those countries. He noted the importance of the judges in those jurisdictions (quality of appellate judges too). He stressed the importance of a high quality judicial system. He stressed the importance of the flexibility of the trust law and case law from the jurisdiction.

D. Read noted the importance of regulated trust companies in the English trust world. He asked Alec to opine on the choice of law issues. He queried what would happen if an inheritance dispute arose. He asked how that would interplay with forced heirship laws.

E. Alec discussed how forced heirship would interact with Bermuda trust laws. He discussed using entities for this planning (and transferring the shares to a trust). He indicated that you can defeat forced heirship laws placing assets outside the jurisdiction.

F. Read discussed foreign grantor trusts. He discussed the ways a non-resident alien may be treated as a grantor.

G. Alec explained the structuring of an offshore trust. He discussed the intricacies of the law and how one country might treat a trust as more like a nominee arrangement as opposed to a trust.

H. Read asked whether the family would need to surrender all personal information for the Swedish family to become a client in Bermuda. Alec noted that KYC
information (“know your client” information) is important. Read noted that in the U.S., grantor information KYC is required but in foreign jurisdictions, grantor and beneficiary KYC is required. Alec noted that just the corporate fiduciary has this information due to the stringency of the bank regulators in those offshore trust jurisdictions.

III. Example 2

A. Read described the second example: investment assets wrapped into a foreign corporation with the goal of deferring U.S. tax until assets are taken out of the foreign corporation. He discussed the history of how taxation was introduced to prevent tax abuses using such planning (anti-deferral rules and PFIC rules, and the year those rules became effective). He noted that his outline was out-of-date here. He indicated that there is no easy solution. He asked Alec what he would recommend.

B. Alec noted that it depends on what the client is trying to do. He indicated the importance of knowing if there were any U.S. assets in the trust.

C. Read noted the effect of making a check-the-box election on this planning. Read asked Alec how this planning is done practically. Alec discussed the interplay of non-operating businesses and directors. He noted the difference in planning when it is a non-operating company. He indicated that DNI calculations and other income tax issues are done by U.S. based accountants and that his firm would look to the client’s U.S. advisors for this work to be done. Read and Alec discussed the importance of different sets of books (U.S. accounting and the country of trust domicile accounting). Read noted the importance of keeping fiduciary accounting records. Read noted that with a grantor trust, there is no DNI or UNI.

D. Read highlighted the importance of dealing with trusts with company interests; he stressed the importance of discussing with the client whether business interests comprise the assets of the trust (especially where an Australian client is involved).

IV. Example 3

A. Read explained the third example: Paul from South Africa, now a U.S. person, is a beneficiary of a trust. Paul has international siblings. The perpetuities period is shorter. The family is all around the world (Canadian, U.S. and Australian). The family is worried about the trust terminating and the throwback tax. The client comes to the advisors looking for solutions.

B. Alec discussed modification of the trust. He noted it depended on the tax goals at play. Read asked if the trustee can do anything. Alec noted that in Bermuda, there is a statute whereby a trustee can apply to a court to amend or vary the trust for such purposes. He highlighted the notice to beneficiaries and representation that must be accomplished. He spent time discussing Section 47 of the Trustee Act (Bermuda) and how that relates to modifying/amending trusts. Read indicated that this provision is
remarkable. He noted that this is for a trust with non-U.S. settlors. He stressed this planning does not work where there are U.S. settlors.

C. Read discussed that in Bermuda, there are trust “acts” (in America there are trust “codes”). Alec highlighted the trust cases in his materials that talk about the perpetuities periods. He noted that trust cases are held in camera (in the judge’s chambers). He discussed a case in Bermuda where an opinion was rendered after the Panama/Paradise Papers. He indicated that the case highlighted the public policy of privacy in Bermuda. He noted that in the Cayman Islands and Jersey, this same public policy probably applies (although it has not been announced via a court decision as it has in Bermuda).

D. Read noted the issue in the U.S. with a beneficiary consenting to trust modifications and the gift tax consequences.

V. Example 4

A. Read explained the fourth fact pattern: Michael and family live in Los Angeles and are beneficiaries of a Bermuda trust. Michael comes to seek our advice on the tax and legal implications of terminating the discretionary Bermuda trust early.

B. Alec noted that the facts and circumstances are important. He discussed the importance of whether the termination is fair to the beneficiaries. He stressed a multitude of factors. Read asked whether Alec would have to go to court to terminate this trust. Alec noted that yes, clients can go to court for the court’s blessing, but note the consequences: what if the trust owns a family business that is about to be sold and liquidating? He noted the case of Public Trustee v. Cooper.

C. Read asked about terminating the trust and distributing all assets to Michael (from the hypothetical example). Alec noted the importance of an indemnity. Read discussed releases and indemnities. He noted that releases and indemnities are routine in the offshore world and take a lot of time to negotiate.

D. Read discussed the importance of knowing the trust’s income for purposes of gains and DNI (using the factual scenario of Michael). He noted the throwback tax and the necessity of records to calculate such tax. He indicated that if the trustee did not have such information, the default method would be used.

E. Alec noted that in Bermuda, if the trustee exercises a power that acts to create a bad result for the beneficiaries, there is a case noting that where a court acts under his discretion and did so without taking into account all of the facts and circumstances, the court can set aside that exercise of that power as a nullity. Alec explained that another U.K. case changed that result, requiring a breach of trust to be proven before the court will set aside the exercise. Alec noted that the rationale for this is protecting the beneficiaries. Read noted how this doctrine is applicable in the U.S. He described that due to the annual accounting period in the U.S., if this is done in the same...
year, it would be okay (but typically the errors are found in subsequent years). He indicated that Gideon Rothschild mentioned to him that there may be a private letter ruling coming out with regards to this issue; stay tuned.

F. Read finished the presentation discussing trustee to trustee distributions from foreign to U.S. trustees. He queried whether the throwback tax applies. He noted to pay attention and read the tax forms on point in this area. Alec discussed indemnities related to such trustee to trustee distribution.

Session I-D

Review of the Past Year's Significant, Curious, or Downright Fascinating Fiduciary Cases (at least it seems to me) [LIT][TRU]
Presenter: Dana G. Fitzsimons, Jr.
Reporter: Michelle Mieras

This session reviewed recent cases from across the country to assist fiduciaries and their advisors in identifying and managing contemporary challenges.

Mr. Fitzsimons kicked off his whirlwind tour of 2017 fiduciary cases by noting that society was particularly dysfunctional last year – oh, and there was fiduciary litigation, too. He noted that he would be walking the audience through others’ failures to help the audience understand how to be a fiduciary or an advisor to a fiduciary. Cases were presented by topic, some of which are summarized below. His comedic presentation appealed to the audience accustomed to dealing with death and taxes.

Elder Abuse:

The first case, Cumming v. Cumming, 2017 Cal. App. Unpub. LEXIS 6129 (2017), arose from particularly sickening facts of neglect and starvation of a mother by her son, who also served as mom’s agent under a power of attorney and as co-trustee (with mom) of a trust established at the death of mom’s spouse (son’s father). Son’s neglect of mom resulted in a laundry list of ailments culminating in the mother’s death. Son’s siblings sued to obtain access to trust records, breach of fiduciary duty as trustee, and to have the son disinherited under California Probate Code Section 259 for financial elder abuse. The trial court ordered the son surcharged for nearly $400K and ordered that the son be
completely disinherited under mom’s will, any trusts, and intestate succession. On appeal by the son, the appellate court upheld the surcharge, but reversed the order of disinheritance, stating that the statute did not permit disinher
tance beyond what the abuser is found to be liable for (i.e., the surcharge amount). Mr. Fitzsimons suggested taking note of this result and considering whether steps should be taken in your state to be able to treat an elder abuser as akin to a slayer for purposes of disinheritance.

Mr. Fitzsimons also discussed Chapman v. Wilkinson, 2017 Iowa Sup. LEXIS 16 (2017), which addressed the question of what makes a person “vulnerable” under an elder financial abuse statute.

Powers of Attorney:

Mr. Fitzsimons introduced the section on powers of attorney by referring to them as the “most effective tool for burglary since the invention of the crowbar.” He then reviewed a trio of cases, including Estate of Bronson, 2017 SD 9 (2017), finding that when a signature is made amanuensis (i.e., a mechanical act), it is not an exercise of a power of attorney. If the person signing amanuensis is also an agent under a POA, the court may presume that the act is covered by the self-dealing prohibitions attaching to an agent under a power of attorney, but the presumption may be rebutted.

State Taxation:

Moving on to states’ ability to tax trusts with limited or no nexus to the state, Mr. Fitzsimons began with Fielding v. Comm’r of Revenue, File Nos. 8911-8914-R (Minnesota Tax Court 2017), which held that a Minnesota statute taxing income of a trust based on the settlor’s domicile when the trust became irrevocable violated due process. Mr. Fitzsimons pointed out that a petition for appeal has been filed in this case. T. Ryan Legg Irrevocable Trust v. Testa, 73 N.E. 3d 381 (Ohio Sup. Ct. 2016) turned out in favor of taxing the trust, although the underlying facts and recent caselaw would have suggested otherwise. Mr. Fitzsimons encouraged anyone interested in the subject to read the brief prepared by the trustee in this case in the petition for writ of certiorari to the US Supreme Court, which was denied.

Decanting:

Mr. Fitzsimons warned against overreacting to decanting decisions that come out. He described the law on new topics, such as decanting, as a pendulum that swings back and forth until the pendulum’s swing centers on what becomes “settled law.” He then discussed Ferri v. Powell-Ferri, 2013 Conn. Super. LEXIS 1938 (2013); 2015 Conn. LEXIS 161 (Ct. Supreme Court, 2015); SJC012070 (Mass. 2017); 2017 Conn. LEXIS 234 (2017) which ultimately upheld decanting where there was no decanting provision in the trust agreement or state law, relying on a facility of payment clause, specific fiduciary powers, and a settlor’s affidavit. Hodges v. Johnson, No. 2016-0130 (New Hampshire Supreme Court, Dec. 12, 2017) voided a trust decanting calling it a violation of the
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truster’s duty of impartiality, despite what appeared to be decanting language in the trust agreement. On the other hand, decanting was upheld in Matter of Hoppenstein, 2017 NY Slip Op 30940(U)(2017), where the trustee essentially decanted the contents of a life insurance trust after the settlor’s threats to stop funding the policy.

Changes to Fiduciary:


Directed Trusts:

Mr. Fitzsimons noted that the law with regard to the use of directed trusts in the context of planning with businesses is another still widely-swinging pendulum. He reviewed Beardmore v. JPMorgan Chase Bank, 2017 Ky. App. LEXIS 60 (2017), noting that this case provides a good roadmap on how to move a trust to Delaware to save state income taxes and modify a trust into a directed trust; Davis v. Davis, 2017 Nev. LEXIS 39 (2017), upholding Nevada’s personal jurisdiction over a trust protector of a Nevada trust; Estate of Zeid 2017 IL App (1st) 162463-U (2017), approving a trustee’s increased fees in light of litigation duties; and Ebling v. Hasken, 2017 Iowa App. LEXIS 1176 (2017), differentiating between the wishes of beneficiaries and the interests of beneficiaries during the course of overturning a summary judgment removing the trustee.

Miscellaneous:

Mr. Fitzsimons then took a “break” by launching into a smattering of unrelated cases covering topics from a minimal (and humorously ineffective) pro se complaint, a case with comical trust amendments that bring into question our educational system, and an attempt to sue for tortious interference of inheritance before the testator died. Mr. Fitzsimons then turned his attention to cases related to distributions, before moving on to alternative dispute resolution cases, wherein he noted a distinction between cases attempting to bind beneficiaries to ADR versus cases where co-trustees were bound by ADR terms of a trust, which they accepted when they agreed to serve as trustee.

Continuing on his topical parade of recent fiduciary cases, Mr. Fitzsimons reviewed cases related to standing to litigate issues with revocable trusts, charitable trust issues, spendthrift protection, powers of appointment, information and privileges (with a special
note to determine from your clients whether they have clear feelings on their fiduciaries being able to access contacts versus content of emails and texts and to draft that position into the will and trust, and releases.

After another rapid-fire list of cases, some with ridiculous facts, Mr. Fitzsimons concluded by encouraging the audience to consider the practice of fiduciary litigation. He noted a deep need for people who understand and want to help facilitate a positive outcome versus applying scorched-earth techniques that are more commonplace in traditional types of litigation.

The Reporters:

Our on-site local Reporters who are present in Orlando in 2018 are Joanne Hindel Esq., a Vice President with Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq., an attorney with McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq., an attorney with the Dreyer Law Firm in Stuart, Florida; Herb Braverman Esq., an attorney with Braverman & Associates in Orange Village, Ohio; Kristin Dittus Esq., a solo attorney with offices in Denver, Colorado, Michael Sneeringer Esq., an attorney with Porter, Wright, Morris and Arthur, LLP in Naples, Florida, Michelle R. Mieras, a Fiduciary Risk Manager with Bank of the West in Denver, Colorado, Beth Anderson Esq., an attorney with Wyatt, Trant & Combs, LLP in Louisville, Kentucky, Bruce A. Tannahill Esq., a Director of Estate and Business Planning in the Mass Mutual Financial Group in Phoenix, Arizona, and Patrick J, Duffey Esq, an attorney with Holland & Knight in Tampa, Florida.

The Report Editors in 2018 are Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is the Chief Moderator of the ABA-PTL discussion list. He is being ably assisted in those duties this year by Reporter Bruce A Tannahill Esq.